



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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Order Instituting Rulemaking Proceeding to
Consider Rules to Implement the Broadband
Equity, Access, and Deployment Program.

Rulemaking No. 23-02-016
(Filed February 23, 2023)

**OPENING COMMENTS OF COMMUNITY LEGAL SERVICES
ON THE ORDER INSTITUTING RULEMAKING PROCEEDING TO CONSIDER
RULES TO IMPLEMENT THE BROADBAND EQUITY, ACCESS, AND
DEPLOYMENT PROGRAM**

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April 17, 2023

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. DISCUSSION	1
2. Geographic Level. The Notice of Funding Opportunity gives flexibility to states to solicit proposals from prospective subgrantees at the geographic level of their choosing—for example, on a per-location basis, per-census block basis, per-town, per-county or another geographic unit. States may alternatively solicit proposals for project areas they define or ask prospective subgrantees to define their own proposed project areas. What is the best, or most appropriate, geographic level for subgrantee proposals?.....	1
3. Overlapping Project Areas. What mechanism should be used for overlapping proposals to allow for a like-to-like comparison of competing proposals?	2
4. Selection Among Priority Broadband Projects. In addition to the Primary Criteria and Secondary Criterion required in the Notice of Funding Opportunity, which additional prioritization factors should be considered? How should they each be measured, and should they be weighted in prioritization?.....	3
5. Selection Among Other Last-Mile Broadband Deployment Projects. In addition to the Primary Criteria and Secondary Criteria required in the Notice of Funding Opportunity, which Additional Prioritization Factors should be considered? How should they each be measured, and should they be weighted in prioritization?.....	3
7. Match Requirement. The IIJA expressly provides that matching funds for the BEAD Program may come from federal regional government entities and from funds that were provided to an Eligible Entity or a subgrantee for the purpose of deploying broadband service under the Families First Coronavirus Response Act, the CARES Act, the Consolidated Appropriations Act of 2021, or the American Rescue Plan Act of 2021, to the extent permitted by those laws. What state funding should also be allowed to be used as matching funds?.....	10
8. Statewide Middle Mile. How should the Commission prioritize subgrantee project proposals that plan on utilizing the statewide open-access middle mile network? Should the Commission require applicants proposing to build their own middle mile infrastructure with BEAD funds to make their network open access? In the event the middle mile portion of an application significantly overlaps the statewide middle mile network, should the applicant be required to consult with the California Department of Technology?.....	11
13. Impacts on environmental and social justice communities, including the extent to which BEAD Program subgrants will impact achievement of any of the nine goals of the Commission’s Environmental and Social Justice Action Plan.	12
III. PROCEDURAL	14
IV. CONCLUSION	14

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I. INTRODUCTION

Pursuant to Rule 6.2 of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), Community Legal Services (“CommLegal”) respectfully submits the following comments on the *Order Instituting Rulemaking Proceeding to Consider Rules to Implement the Broadband Equity, Access, and Deployment Program* (“OIR”). The OIR was issued on March 1, 2023, and calls for Comments to be filed no later than 45 days from the date the Rulemaking was issued.

For the convenience of the Commission and stakeholders, these Comments retain the numbering of questions as presented in the OIR, for those questions we provide comments on. CommLegal reserves the right to respond in Reply Comments as appropriate to topics which we do not address in Opening Comments.

II. DISCUSSION

- 2. Geographic Level.** The Notice of Funding Opportunity gives flexibility to states to solicit proposals from prospective subgrantees at the geographic level of their choosing—for example, on a per-location basis, per-census block basis, per-town, per-county or another geographic unit. States may alternatively solicit proposals for project areas they define or ask prospective

subgrantees to define their own proposed project areas. What is the best, or most appropriate, geographic level for subgrantee proposals?

The Commission should allow subgrantees to propose projects at any level which the subgrantee can effectively address, including individual buildings to the county level. This flexibility will help to meet the goal of the Broadband Equity, Access, and Deployment (“BEAD”) Program, which is “universal broadband access and adoption.”¹ The BEAD Notice of Funding Opportunity (“NOFO”) states that service projects may be as small as a single broadband-serviceable location.² Furthermore, since Public Utilities Code section 281(f)(6)(A) specifically declares that “[a]n individual household or property owner shall be eligible to apply for a grant to offset the costs of connecting the household or property to an existing or proposed facility-based broadband provider,” allowing projects to serve individual locations is consistent with the California Advanced Services Fund (“CASF”) Program. The state-funded CASF Program and the federally funded BEAD program should be allowed to work in tandem to help bridge the digital divide, and, as discussed further in answer to question 7, the Commission should allow CASF funding to be used as BEAD matching funds.

3. Overlapping Project Areas. What mechanism should be used for overlapping proposals to allow for a like-to-like comparison of competing proposals?

The BEAD NOFO states, “If the Eligible Entity allows prospective subgrantees to define proposed project areas, it must develop a mechanism for de-conflicting overlapping proposals (for example, by de-scoping some locations from a provider’s proposed project area) to allow for

¹ National Telecommunications and Information Administration (“NTIA”) Notice of Funding Opportunity, Broadband Equity, Access, and Deployment Program (“BEAD NOFO”) at Sec. I.B.2 (accessed at <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf>).

² “An ‘Underserved Service Project’ may be as small as a single underserved broadband-serviceable location.” BEAD NOFO Sec. I.C.cc. “An ‘Unserved Service Project’ may be as small as a single unserved broadband-serviceable location.” BEAD NOFO Sec. I.C.ee.

like-to-like comparison of competing proposals.”³ The Commission should ensure that competing proposals are objectively compared. To do so, CommLegal suggests that the Commission utilize the scoring system ultimately adopted for selection among broadband projects (questions 4 and 5 below) to score the overlapping portion(s) of the proposals. Then, the Commission should de-scope the overlapping locations from the lower scoring proposal(s). The BEAD NOFO requires that, in general,⁴ priority broadband projects, i.e., “those that use end-to-end fiber-optic technology,”⁵ take precedence over non-priority competing projects. Therefore, if only one of the overlapping projects is a priority project that meets all of the other requirements of the BEAD NOFO, that project would be selected, and the overlapping location(s) would be de-scoped from the other proposal(s). Ensuring that the proposals which meet more of the priority criteria are the ones that are approved to cover overlapping areas furthers BEAD project goals by providing greater benefits to more households.

- 4. Selection Among Priority Broadband Projects. In addition to the Primary Criteria and Secondary Criterion required in the Notice of Funding Opportunity, which additional prioritization factors should be considered? How should they each be measured, and should they be weighted in prioritization?**
- 5. Selection Among Other Last-Mile Broadband Deployment Projects. In addition to the Primary Criteria and Secondary Criteria required in the Notice of Funding Opportunity, which Additional Prioritization Factors should be considered? How should they each be measured, and should they be weighted in prioritization?**

³ BEAD NOFO Sec. IV.B.7.a.ii.7.

⁴ “An Eligible Entity’s process in selecting subgrantees for last-mile broadband deployment projects must first assess which locations or sets of locations under consideration are subject to one or more proposals that (1) constitute Priority Broadband Projects and (2) satisfy all other requirements set out in this NOFO with respect to subgrantees. In the event there is just one proposed Priority Broadband Project in a location or set of locations, and that proposal does not exceed the Eligible Entity’s Extremely High Cost Per Location Threshold, that proposal is the default winner, unless the Eligible Entity requests, and the Assistant Secretary grants, a waiver allowing the Eligible Entity to select an alternative project.” BEAD NOFO Sec. IV.B.7.b.2.

⁵ BEAD NOFO Sec. IV.B.7.b.2.i.

As mentioned above, BEAD priority broadband projects “are those that use end-to-end fiber-optic technology.”⁶ Consequently, “other” last-mile broadband deployment projects are those that use technology other than end-to-end fiber-optic technology. The BEAD NOFO details mandatory primary criteria, which must constitute at least 75% of the prioritization weight, and mandatory secondary criteria, which must be given some weight, for both priority broadband projects and other broadband projects.⁷ The BEAD NOFO also suggests some additional prioritization factors that states are encouraged to consider.⁸ Many of the factors are the same or similar for both priority and other broadband projects. We will consider and comment on each factor in turn.

A. Primary Criteria

- ***Minimal BEAD Program Outlay.*** The total BEAD funding that will be required to complete the project, accounting for both total projected cost and the prospective subgrantee’s proposed match (which must, absent a waiver, cover no less than 25 percent of the project cost), with the specific points or credits awarded increasing as the BEAD outlay decreases. In comparing the project’s BEAD outlay and the prospective subgrantee’s match commitments, Eligible Entities should consider the cost to the Program per location while accounting for any factors in network design that might make a project more expensive, but also more scalable or resilient.⁹

This requirement applies to both priority and other broadband projects. CommLegal supports this criterion. As discussed more in comments on question 7 below, CommLegal supports the Commission allowing state funding sources to be used as matching funds, as this helps to leverage federal and state funds and also assists subgrantee applicants that do not have the financial means to contribute matching funds themselves. On the other hand, CommLegal

⁶ BEAD NOFO Sec. IV.B.7.b.2.i.

⁷ BEAD NOFO Sec. IV.B.7.b.2.i and Sec. IV.B.7.b.2.ii.

⁸ BEAD NOFO Sec. IV.B.7.b.2.i and Sec. IV.B.7.b.2.ii.

⁹ BEAD NOFO Sec. IV.B.7.b.2.i and Sec. IV.B.7.b.2.ii.

supports subgrantees having some “skin in the game,” if they are financially able. Applicants that contribute monetarily to a project are more likely to spend all funds more cost-effectively and wisely because efficiency will have a direct impact on their financial commitment. Additionally, this helps leverage and expand the reach of state broadband funds.

- ***Affordability***. The prospective subgrantee’s commitment to provide the most affordable total price to the customer for 1 Gbps/1 Gbps service in the project area [for priority projects].¹⁰
- ***Affordability***. The prospective subgrantee’s commitment to provide the most affordable total price to the customer for 100/20 Mbps service in the proposed service area [for other projects].¹¹

CommLegal strongly supports this criterion. Since broadband service providers have less financial incentive to deploy broadband in low-income, rural, and hard-to-reach areas, it is imperative that broadband funding programs prioritize projects that will provide affordable high-speed internet access to these areas. CommLegal appreciates that “access to affordable broadband is among the Infrastructure [and Job] Act’s [(“IIJA”)] objectives” and that the BEAD Program requires that “[l]ow-cost broadband service options must remain available for the useful life of the network assets.”¹² Little public benefit will ensue from the construction of broadband infrastructure if residents are not able to afford the service plans offered.

Prioritizing gigabit-capable infrastructure is prudent to help ensure, as much as possible, that subsidized buildout is future-proof and will not soon need additional funding to upgrade. It is short-sighted to unnecessarily subsidize obsolete technology that will soon need additional funding to upgrade if it is to allow subscribers to keep up with advancing technologies.

- ***Fair Labor Practices***. Eligible Entities must give priority to projects based on a prospective subgrantee’s demonstrated record of and plans to be in compliance with Federal labor and employment laws. New entrants without a record of labor and employment law compliance must be permitted to mitigate

¹⁰ BEAD NOFO Sec. IV.B.7.b.2.i.

¹¹ BEAD NOFO Sec. IV.B.7.b.2.ii.

¹² BEAD NOFO Sec. IV.C.2.c.i.

this fact by making specific, forward-looking commitments to strong labor and employment standards and protections with respect to BEAD-funded projects. This prioritization requirement is described in further detail in Section IV.C.1.e of this NOFO.¹³

This requirement applies to both priority and other broadband projects. CommLegal supports this criterion. As stated in the BEAD NOFO, giving priority to projects that have plans to be in compliance with federal labor and employment laws will help ensure that subgrantees can competently carry out funded activities in accordance with the law and will “promote the effective and efficient completion of high-quality broadband infrastructure projects by ensuring a reliable supply of skilled workers and minimizing disruptive and costly delays.”¹⁴

B. Secondary Criteria

- ***Speed to Deployment.*** All subgrantees that receive BEAD Program funds for network deployment must deploy the planned broadband network and begin providing services to each customer that desires broadband services within the project area not later than four years after the date on which the subgrantee receives the subgrant from the Eligible Entity. Eligible Entities must give secondary criterion prioritization weight to the prospective subgrantee’s binding commitment to provide service by an earlier date certain, subject to contractual penalties to the Eligible Entity, with greater benefits awarded to applicants promising an earlier service provision date.¹⁵
- ***Speed to Deployment.*** The prospective subgrantee’s binding commitment to provision service by a date certain, subject to contractual penalties to the Eligible Entity, with greater benefits awarded to prospective subgrantees promising an earlier service provision date.¹⁶

CommLegal supports this criterion because it will encourage subgrantees to work faster than the BEAD Program requires. Shorter deployment timelines will help ensure that unserved and underserved residents and business are connected sooner and will lead to a more expeditious end to the digital divide.

¹³ BEAD NOFO Sec. IV.B.7.b.2.i and Sec. IV.B.7.b.2.ii.

¹⁴ BEAD NOFO Sec. IV.C.1.e.

¹⁵ BEAD NOFO Sec. IV.B.7.b.2.i.

¹⁶ BEAD NOFO Sec. IV.B.7.b.2.ii.

- ***Speed of Network and Other Technical Capabilities.*** Eligible Entities must weigh the speeds, latency, and other technical capabilities of the technologies proposed by prospective subgrantees seeking to deploy projects that are *not Priority Broadband Projects*. Applications proposing to use technologies that exhibit greater ease of scalability with lower future investment (as defined by the Eligible Entity) and whose capital assets have longer useable lives should be afforded additional weight over those proposing technologies with higher costs to upgrade and shorter capital asset cycles.¹⁷

Since, by definition, priority projects use end-to-end fiber-optic architecture, this criterion only applies to non-priority broadband projects. CommLegal supports this criterion because, as stated above regarding prioritizing gigabit-capable infrastructure, it is prudent to help ensure, as much as possible, that subsidized buildout is future-proof and will not soon need additional funding to upgrade. It is short-sighted to unnecessarily subsidize obsolete technology that will soon need additional funding to upgrade so that subscribers are able to keep up with advancing technologies.

C. Additional Prioritization Factors

- ***Equitable Workforce Development and Job Quality.*** NTIA encourages Eligible Entities to adopt selection criteria relating to the subgrantee's enforceable commitments with respect to advancing equitable workforce development and job quality objectives, see Section IV.C.1.f of this NOFO.¹⁸

The BEAD NOFO suggests this as an additional prioritization factor for both priority and other broadband projects. The Commission should give weight to this factor in selecting competing applications. CommLegal suggests that the Commission give points to applications that contemplate the following:

¹⁷ BEAD NOFO Sec. IV.B.7.b.2.ii (emphasis added).

¹⁸ BEAD NOFO Sec. IV.B.7.b.2.i and Sec. IV.B.7.b.2.ii.

(1) Hiring employees from low-income and other marginalized communities. Partnering with non-profit organizations that provide job training and development can help locate appropriate workers.

(2) Providing additional job training, if necessary.

(3) Contracting with disadvantaged business enterprises that are registered with the Supplier Clearinghouse.¹⁹

Prioritizing applications that include these commitments will help ensure equitable workforce development in projects supported by BEAD Program funding.

- ***Open Access.*** NTIA encourages Eligible Entities to adopt selection criteria promoting subgrantees' provision of open access wholesale last-mile broadband service for the life of the subsidized networks, on fair, equal, and neutral terms to all potential retail providers.²⁰

The BEAD NOFO suggests this as an additional prioritization factor for both priority and other broadband projects. CommLegal supports BEAD-subsidized networks being open access and, thus, encourages the Commission to use this as an additional prioritization factor. Our promotion of open access for publicly subsidized networks is based upon the policy that publicly funded infrastructure should be utilized for public benefits. With last-mile open access networks, consumers will potentially be able to choose between several providers and will, therefore, be more likely to have access to options and prices that best fit their particular situations and will, additionally, be able to switch providers if they so desire. This will foster a healthy competition between internet providers.

- ***Local and Tribal Coordination.*** NTIA encourages Eligible Entities to adopt selection criteria reflecting a prospective subgrantee's support from the local and/or Tribal Government with oversight over the location or locations to be served.²¹

¹⁹ For information about the Supplier Diversity Program, go to <https://www.cpuc.ca.gov/supplierdiversity/>.

²⁰ BEAD NOFO Sec. IV.B.7.b.2.i and Sec. IV.B.7.b.2.ii.

²¹ BEAD NOFO Sec. IV.B.7.b.2.i and Sec. IV.B.7.b.2.ii.

The BEAD NOFO suggests this as an additional prioritization factor for both priority and other broadband projects. CommLegal also encourages the Commission to use this as an additional prioritization factor. In the BEAD Program, eligible entities (states) are required to coordinate with local and Tribal governments because “[l]ocal and Tribal coordination and stakeholder engagement is critical to the BEAD Program’s success, to eliminating barriers to broadband access and adoption, and to rapidly and economically building out new broadband networks” and “[l]ocal coordination promotes alignment of priorities between Eligible Entity and local and Tribal officials and helps ensure visibility of local needs and preferences.”²² Encouraging prospective subgrantees to also coordinate with and to obtain support from local and Tribal governments will harmonize the efforts of the state and the prospective subgrantees by ensuring the alignment of subgrantees’ and local and Tribal government priorities. The local and Tribal governments are more likely to know the needs and desires of their local communities and can impart this knowledge both to the state and to the subgrantees.

Additionally, “Eligible Entities and their political subdivisions are strongly encouraged to remove time and cost barriers associated with BEAD projects, including by expediting permitting timelines and waiving fees where applicable, where doing so does not undermine other critical policy goals.”²³ Coordination between and among the state, local or Tribal governments, and prospective subgrantees should promote the effective removal of time and cost barriers, which will save public funds and facilitate faster deployment of broadband to the unserved and underserved.

- ***Positive Impact on the Commission’s Environmental and Social Justice (“ESJ”) Action Plan***

²² BEAD NOFO Sec. IV.C.1.c.

²³ BEAD NOFO Sec. IV.B.5.b.14.

Additionally, CommLegal encourages the Commission to give points to subgrantee applications that provide for a positive impact on the ESJ Action Plan. Please see comments on question 13 below.

7. **Match Requirement. The IIJA expressly provides that matching funds for the BEAD Program may come from federal regional government entities and from funds that were provided to an Eligible Entity or a subgrantee for the purpose of deploying broadband service under the Families First Coronavirus Response Act, the CARES Act, the Consolidated Appropriations Act of 2021, or the American Rescue Plan Act of 2021, to the extent permitted by those laws. What state funding should also be allowed to be used as matching funds?**

The Infrastructure and Job Act (“IIJA”), which establishes the BEAD Program, expressly allows funds provided by the state to be used as matching funds.²⁴ The Commission should allow projects to obtain matching funds from any permitted state funding sources, including CASF and Broadband for All. The Commission should seize the opportunity to prudently leverage state and federal funds, which will create public benefits, by increasing consumer access to the internet and associated services, and will support government interests, such as improved disaster and emergency relief, dissemination of safety information, and national security and law enforcement efforts.²⁵ However, to avoid enriching subgrantees and to allow the funds to support more projects, the Commission should not allow for funding in excess of 100% of project costs from state and federal sources. Additionally, the Commission should require subgrantees that are

²⁴ “(B) SOURCE OF MATCH.—A matching contribution under subparagraph (A)—(i) may be provided by an **eligible entity**, a unit of local government, a utility company, a cooperative, a nonprofit organization, a for-profit company, regional planning or governmental organization, a Federal regional commission or authority, or any combination thereof . . .” P.L. 117-58 §60102(h)(3)(B) (2021) (**emphasis added**). “The term ‘eligible entity’ means a State.” P.L. 117-58 §60102(a)(2)(F).

²⁵ See October 15, 2020 *Opening Comments of the National Diversity Coalition on Staff Proposal on State-Funded Broadband Infrastructure Funds Leveraging* (R.20-08-021) at 3-4.

financially able to provide a portion of the matching funds themselves, in order to leverage and to extend the reach of both the federal and state funds.²⁶

8. Statewide Middle Mile. How should the Commission prioritize subgrantee project proposals that plan on utilizing the statewide open-access middle mile network? Should the Commission require applicants proposing to build their own middle mile infrastructure with BEAD funds to make their network open access? In the event the middle mile portion of an application significantly overlaps the statewide middle mile network, should the applicant be required to consult with the California Department of Technology?

To avoid wasteful, unnecessary, and inefficient overbuild, the Commission should require subgrantees to utilize the statewide open-access middle mile network if it is feasible to do so rather than to expend BEAD funds to build redundant middle-mile infrastructure. If it necessary for subgrantees to build additional middle-mile infrastructure with BEAD funds, these networks should be open access – providing public benefits with public funds. Open access is defined in the BEAD NOFO as follows:

The term “open access” refers to an arrangement in which the subgrantee offers *nondiscriminatory* access to and use of its network on a **wholesale basis** to other providers seeking to provide broadband service to end-user locations, at **just and reasonable wholesale rates** for the useful life of the subsidized network assets. For this purpose, “just and reasonable wholesale rates” means rates that include a discount from the provider’s retail rates reflecting the costs that the subgrantee avoids by virtue of not providing retail service to the end user location (including, for example, marketing, billing, and collection-related costs).²⁷

Regarding middle-mile infrastructure, the specific terms of the BEAD NOFO require something less than what is defined as open access, i.e., that “[a]ny subgrantee receiving funds to deploy Middle Mile Infrastructure under this Program in connection with service to an Unserved

²⁶ BEAD NOFO Sec. III.B.2 (citation omitted) states, “While the match may be provided by multiple sources, Eligible Entities are encouraged to require a match from the subgrantee rather than utilizing other sources where it deems the subgrantee capable of providing matching funds. This approach will maximize the impact of Eligible Entity funds and funds provided via other federal programs.”

²⁷ BEAD NOFO Sec. I.C.q (emphasis added).

Service Project or an Underserved Service Project shall permit other broadband service providers to interconnect with its funded Middle Mile Infrastructure network facilities on a *just, reasonable, and nondiscriminatory basis*” and that “[r]ates and terms for interconnection shall be *reasonable and nondiscriminatory*.”²⁸ In order to ensure that any middle-mile infrastructure constructed using BEAD funds is truly “open access” and to avoid any confusion, the Commission should modify the BEAD NOFO terms to require subgrantees to offer “wholesale” rates that “include a discount from the provider’s retail rates reflecting the costs that the subgrantee avoids by virtue of not providing retail service to the end user location.”²⁹

If there are situations where the middle mile portion of an application significantly overlaps the statewide middle mile network, the Commission should require that the applicant consult with the California Department of Technology both to determine necessity of building the additional middle-mile infrastructure and to ensure that there is no conflict. As stated above, subgrantees should be required to utilize the statewide open-access middle mile network if feasible, rather than to expend BEAD funds on unnecessary construction costs.

13. Impacts on environmental and social justice communities, including the extent to which BEAD Program subgrants will impact achievement of any of the nine goals of the Commission’s Environmental and Social Justice Action Plan.

Each subgrantee applicant should include in its proposal information on how the proposed project will impact the achievement of any of the goals of the Commission’s Environmental and Social Justice (“ESJ”) Action Plan. The following ESJ goals seem particularly pertinent here:

²⁸ BEAD NOFO Sec. IV.C.2.c.v. (emphasis added).

²⁹ BEAD NOFO Sec. I.C.q.

GOAL 3: STRIVE TO IMPROVE ACCESS TO HIGH-QUALITY WATER, COMMUNICATIONS, AND TRANSPORTATION SERVICES FOR ESJ COMMUNITIES.

....

3.4 Extend Essential Communications Services to ESJ Communities: Ensure implementation of new investments that offer ESJ communities' access to essential communications services at affordable rates.³⁰

GOAL 5: ENHANCE OUTREACH AND PUBLIC PARTICIPATION OPPORTUNITIES FOR ESJ COMMUNITIES TO MEANINGFULLY PARTICIPATE IN THE CPUC'S DECISION-MAKING PROCESS AND BENEFIT FROM CPUC PROGRAMS

....

5.2 Continue to Emphasize Engagement with CBOs: Deepen relationships and network connections with community-based organizations throughout the state.

5.3 Build Pathways for Public Participation: Based on lessons learned and areas of improvement, build additional and enhanced pathways to welcome and involve ESJ stakeholders into CPUC processes.

5.4 Enhance Engagement with Particular ESJ Communities: Consider the specific needs of particular populations and work to create targeted engagement opportunities.³¹

REVISED GOAL 7: PROMOTE HIGH ROAD 44 CAREER PATHS AND ECONOMIC OPPORTUNITY FOR RESIDENTS OF ESJ COMMUNITIES.

....

7.3 Partner with Utilities and Sister Agencies: Engage sister agencies with authority and expertise on workforce-related issues and regulated utilities in promoting economic opportunity for ESJ communities.³²

³⁰ CPUC Environmental & Social Justice Action Plan Version 2.0, April 7, 2022, at 24, accessed at <https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/news-and-outreach/documents/news-office/key-issues/esj/esj-action-plan-v2jw.pdf> (citation omitted).

³¹ CPUC Environmental & Social Justice Action Plan Version 2.0, April 7, 2022, at 24-25, accessed at <https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/news-and-outreach/documents/news-office/key-issues/esj/esj-action-plan-v2jw.pdf>.

³² CPUC Environmental & Social Justice Action Plan Version 2.0, April 7, 2022, at 25, accessed at <https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/news-and-outreach/documents/news-office/key-issues/esj/esj-action-plan-v2jw.pdf>.

As mentioned above in comments to questions 4 and 5, this component should be integrated into the additional prioritization factors.

III. PROCEDURAL

CommLegal agrees with the preliminary categorization of this proceeding as quasi-legislative and that evidentiary hearings will likely not be necessary.

Service of notices, orders, and other correspondence in this proceeding should be directed to the following:

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CommLegal requests to be noted on the service list as “email service only.”

Please add as information only the following:

Tadashi Gondai, General Counsel
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IV. CONCLUSION

CommLegal appreciates the opportunity to provide comments in this proceeding and looks forward to participating in the development of rules for subgrantees who apply for BEAD funding.

April 17, 2023

Respectfully Submitted,

/s/ Brycie Loepp
Brycie Loepp, Staff Attorney
COMMUNITY LEGAL SERVICES